Supreme Court U.S.
FILED

061320 APR 02 2007

OFFICE OF THE CLERK

In the Supreme Court of the United States

THOMAS ALLEN SPENCER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

BRIAN STEEL, ESQ.
COUNSEL OF RECORD
THE STEEL LAW FIRM
1800 PEACHTREE STREET, NW
SUITE 300
ATLANTA, GA 30309
404-605-0023

Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED

Whether the Supreme Court of Georgia Erred in Ruling that Petitioner Could Be Retried on a Count of Malice Murder After He Had Been Previously Acquitted By a Jury of that Count in a Prior Trial.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities ..... iii, iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Petition 2

Conclusion 5

Appendix A
Georgia Supreme Court Opinion,
dated January 22, 2007 ..... 1A

Appendix B
Constitutional and Statutory Provisions 4A

TABLE OF AUTHORITIES

Cases

Benton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707, (1969) 4
California v. Peltan, 7 P.2d 205 (1931) 4
Connecticut v. Mbaye, 740 A.2d 923 (1999) 3
Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963) 5
Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 2d 891 (1956) 5
Howard v. Texas, 192 S.W. 770 (1917) 4
Kemper v. Unites States, 195 U.S. 100, 24 S. Ct. 797, 49 L.Ed. 114 (1904) 3,5
New Mexico v. Apodaca, 735 P.2d 1156 (1987) 4
North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969) 5
People v. Curoe, 97 Ill. App. 258 (1981) 3
Serfass v. United States, 420 U.S. 377, 95 S. Ct. 1055, 43 L.Ed.2d 265 (1975) 3,5
Spencer v. State, 281 Ga. 533, 640 S.E.2d 267 (2007) 1
United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) 5
United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971) 2,3
United States v. White, 764 F.Supp. 254 (D. Conn. 1991) 3
West Virginia v. Moore, 49 S.E. 1015 (1905 4

Amendments to the United States Constitution

Fifth Amendment 1,2
Fourteenth Amendment 1,2

Federal Statutes

28 U.S.C.§ 1257(a) 1

State Statutes

O.C.G.A. § 15-12-139 3

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at *Spencer v. State,* 281 Ga. 533, 640 S.E.2d 267 (2007).

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was entered on January 22, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C.§ 1257(a), petitioner having asserted in the state court and herein a deprivation of rights secured under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Prior Proceedings

Petitioner was indicted by the Fulton County, Georgia, Grand Jury on April 2, 2004 for one count of malice murder, one count of felony murder, one count of aggravated assault and one count of possession of a firearm during the commission of a crime. On December 10, 2004, Petitioner was acquitted of malice murder but convicted on the other counts of the indictment.

Petitioner subsequently filed a motion for new trial which was granted by the trial court because of the trial courts failure to swear the jury, as required by state law, before the trial on the indictment. Prior to a retrial, Petitioner filed a plea in bar on double jeopardy grounds

seeking to prevent the state from retrying him for the malice murder count on which he had been acquitted at the previous trial. The trial court denied Petitioner's plea in bar and he next filed an appeal to the Supreme Court of Georgia from the trial courts ruling. On January 22, 2007, the Supreme Court of Georgia affirmed the trial court's denial of Petitioners plea in bar

REASONS FOR GRANTING THE PETITION

The Decision of the Georgia Supreme Court Violates the Constitutional Double Jeopardy Protections in the Fifth and Fourteenth Amendments of the United States Constitution and is in Conflict with Decision of this Court and the Only Other State Court to Consider the Issue.

The constitutional prohibition against double jeopardy, contained in the Fifth and Fourteenth Amendments to the United States Constitution, was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for the same offense. The reasoning behind the Double Jeopardy Clause is deeply ingrained in the American system of justice; namely, that prosecutors, with all their resources and power, are not allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting that individual to embarrassment, expense, and ordeal; compelling the criminally accused to live in a continued state of anxiety and insecurity as well as enhancing the possibility that even though innocent, he may be convicted. See *United States v. Jorn,* 400 U.S. 470, 479, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971). This policy recognizes the extreme burden placed upon a criminal defendant when confronted with a trial which could cost him his freedom.

The Double Jeopardy Clause forbids a second trial which affords the prosecution a second opportunity to supply evidence which the prosecutors failed to present in the first trial. Therefore, the state is afforded only one opportunity to present its evidence to the trier of facts. *People v. Curoe,* 97 Ill. App. 258 (1981); *Connecticut v. Mbaye,* 740 A.2d 923 (1999). This Court has held that jeopardy attaches when an accused is "put to trial before the trier of facts, whether the trial be a jury or judge." *Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L.Ed.2d 265 (1975). See *United States v. White,* 764 F.Supp. 254 (D. Conn. 1991).

An acquittal on a count of an indictment is a legal determination on the basis of the facts produced at trial relating to the issues contained in the elements of the offense charged in the indictment. *Unites States v. Jorn, supra* at 479. The universal law is that a verdict of acquittal in a criminal case is final and conclusive, and there can be no new trial of a criminally accused on the same crime after an acquittal. A verdict of acquittal is final and may not be reviewed on error or otherwise without an accused being placed twice on jeopardy in violation of the Constitution. See *Kemper v. Unites States*, 195 U.S. 100, 24 S. Ct. 797, 49 L.Ed. 114 (1904).

The Supreme Court of Georgia considered this issue in Petitioner's case on direct appeal and held that "a finding of not guilty on a criminal charge returned by an unsworn jury" does not act as a bar to retrial on such charge. (App. 1A) The Georgia court based its decision on a state statute, O.C.G.A. § 15-12-139, that requires that a jury be sworn before trial and that when a jury trial proceeds without the mandatory oath, considerations of public policy render the oath "jurisdictional in character." (App. 2A) Thus, the Georgia court implicitly found that public policy considerations of the state statute outweighed the fundamental policy considerations underpinning the Double Jeopardy Clause, and ruled that Petitioner could be retried

for the malice murder charge. However, this Court in *Benton v. Maryland,* 395 U. S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969) held that the guarantee against double jeopardy "represents a fundamental ideal in our constitutional heritage" which Petitioner argues outweighs the unenumerated public policy considerations upon which the Georgia Supreme Court based its decision.

Other jurisdictions which have considered the issue of the effect of verdicts rendered by an unsworn jury have all held that any *conviction* thus returned be reversed. See *New Mexico v. Apodaca,*735 P.2d 1156 (1987) (a complete failure to swear the petit jury cannot be waived and a *conviction* by an unsworn jury is generally held to be a nullity); *California v. Peltan*, 7 P.2d 205 (1931) (an entire failure to swear the jury cannot be waived in any manner or under any circumstances, and hence, a *conviction* by an unsworn jury is a nullity); *West Virginia v. Moore*, 49 S.E. 1015 (1905) (a person cannot be legally *convicted* unless the record shows that the jury which tried the case was sworn according to law).

The only other state court decision to consider the effect of an acquittal rendered by an unsworn jury is found in *Howard v. Texas*, 192 S.W. 770 (1917). In this case, Mr. Howard was indicted for the crime of murder. After the close of the evidence, the trial judge charged the jury on the indicted offense of murder and the unindicted offense of manslaughter. The jury convicted Howard of manslaughter and acquitted him of murder. The Texas court reversed the manslaughter conviction because the trial jury had not been sworn but barred the state from retying Howard for the acquitted offense of murder.

The Supreme Court of Georgia reasoned that because the jury at Petitioner's trial was unsworn and that any decision rendered by that jury was a nullity, Petitioner had in fact not been placed in jeopardy at all and therefore double jeopardy protections did not attach. (App. 3A) This

reasoning however is in conflict with the plain holdings of *Serfass v. United States, supra*, and *Kemper v. United States, supra.*

The holding of the Supreme Court of Georgia also ignores the effect such a rule will have on the exercise of appellate rights if a similarly situated defendant has to choose whether to appeal. If allowed to stand, the Georgia Supreme Courts reasoning will chill the exercise of appellate rights as recognized in *United States v. Jackson,* 390 U.S. 570, 88 S,Ct. 1209, 20 L.Ed.2d 138 (1968), where this Court criticized a policy which would, "chill the exercise of basic constitutional rights." *Id.,* at 582. See *North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969). Courts may not impose burdens which restrict freedom to open and equal access to the courts, including the right to appeal. *Griffin v. Illinois*, 351 U.S. 12, 17-20, 76 S. Ct. 585, 100 L. Ed. 2d 891 (1956). *Douglas v. California,* 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963).

CONCLUSION

For the reasons set out above, Petitioner, Thomas Allen Spencer respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

BRIAN STEEL, ESQ.
COUNSEL OF RECORD
THE STEEL LAW FIRM
1800 PEACHTREE STREET, NW
SUITE 300
ATLANTA, GA 30309
404-605-0023
Counsel for Petitioner

APPENDIX A

In the Supreme Court of Georgia

Decided: January 22, 2007

S06A1719. SPENCER V. THE STATE

HINES, Justice.

The issue in this appeal is whether a finding of not guilty on a criminal charge returned by an unsworn jury acts as a bar to retrial on such charge. Finding that it does not, we affirm the trial court's denial of the defendant's plea in bar.

Thomas Allen Spencer was indicted for malice murder, felony murder while in the commission of aggravated assault, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony in connection with a fatal shooting. A jury acquitted Spencer of the malice murder count but found him guilty of the remaining charges, and he was sentenced thereon. However, the superior court granted Spencer a new trial[1] because it is undisputed that the jury was never administered the petit jury oath pursuant to O.C.G.A. § 15-12-139.[2]

---

[1] Spenser raised, inter alia, the issue of the jury being unsworn in his amended motion for new trial.

[2] O.C.G.A. § 15-12-139 provides:
In all criminal cases, the following oath shall be administered to the trial jury:
"You shall well any truly try the issue formed upon this bill of indictment (or accusation) between the State of Georgia and the (name of accused), who

Spencer then filed a plea in bar to exclude the malice murder count in the new trial on the basis of double jeopardy.[3] The superior court denied the plea.

This Court has made plain that the petit jury oath provided in O.C.G.A. § 15-12-139 is mandatory; consequently, the failure to administer this oath to the trial jury requires the setting aside of any conviction based upon the decision of such an unsworn body and that there be a subsequent retrial. *Grant v. State,* 272 Ga. 213 (528 SE.2d 512) (2000), citing *Slaughter v. State,* 100 Ga. 323 (28 SE 159) (1897). See also *Keller v. State,* 261 Ga. App. 769 (583 SE2d 591) (2003). Spencer agrees that any such conviction is a nullity; however, he argues that an *acquittal* determined by the same unsworn body is valid and binding because of the constitutional and statutory prohibitions against double jeopardy. Indeed, Spencer posits that no case in any jurisdiction supports the idea that an acquittal by an unsworn jury is a nullity which permits prosecution a second time. But, Spencer need look no farther than the long-standing law of this State.

When, as in this case, a trial jury proceeds without this mandatory oath, the statutory requirement becomes jurisdictional in character, involving considerations of public policy. *Slaughter v. State,* supra at 326.

> [T]here must be a lawful tribunal; and, where the trial is by jury, it must be legally constituted, or it will be without authority to

---

is charged with the (here state the crime or offense), and a true verdict give according to the evidence. So help you God."
The judge or clerk of the court shall administer the oath to the jurors.

3

Spencer makes claims of double jeopardy under the Federal and State Constitutions and O.C.G.A. § 16-1-8.

> pass upon the issues submitted. No one can properly be deemed a juror, or competent to act in that capacity, until he [or she] has been duly qualified; and one of the express requirements of the law is that, before [the juror] shall enter upon the discharge of his [or her] duties,[the juror] must take a solemn oath to the effect that [the juror] will perform his [or her] office uprightly and impartially. This is no empty formality.

Id.

Consequently, Spencer's jury was wholly withpout authority to pass upon any of the issues at trial, and therefore, to make any determoinations whatsoever regarding guilt or innocence. Spencer's assertion of former jeopardy is also belied by the fact that, in either the context of a constitutional claim or that under the extended state statutory protection, jeopardy does not attach in a jury trial until the jury is both impaneled and *sworn*. *Alexander v. State,* 279 Ga. 683, 685 (2) (b) (620 SE2d 729) (2005); *Teal v. State,* 203 Ga. App. 440, 442 (2) (417 SE2d 666) (1992); *Geckles v. State,* 177 Ga. App. 70, 71 (1) (b) (338 SE2d 473) (1985). Thus, Spencer was not placed in jeopardy at all, regardless of the attempted trial and the pronouncements of the fatally infirm jury.

The superior court correctly denied Spencer's plea in bar.

Judgment affirmed. All the Justices concur.

APPENDIX B

Amendments to the United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness, against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutory Provisions

28 U.S.C. § 1257(a)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the United States Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is

specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

State Statutes

O.C.G.A. § 15-12-139

In all criminal cases, the following oath shall be administered to the trial jury:

"You shall well any truly try the issue formed upon this bill of indictment (or accusation) between the State of Georgia and the (name of accused), who is charged with the (here state the crime or offense), and a true verdict give according to the evidence. So help you God."

The judge or clerk of the court shall administer the oath to the jurors.